Kombe v Republic (Criminal Miscellaneous Application E108 of 2021) [2024] KEHC 260 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 260 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL MISCELLANEOUS APPLICATION E108 OF 2021

RN NYAKUNDI, J

JANUARY 24, 2024

BETWEEN

SIMON KIPTANUI KOMBE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an Application for Re-Sentencing Arising Out of Cr. 52 Of 1997)

RULING

1. On 6th February, 2001, the trial court in Eldoret Criminal Case NO. 52 of 1997, convicted and sentenced Simon Kiptanui Kombe to death for the offence of murder contrary to Section 203 as read with section 204 of the *Penal Code*.

2. The Applicant subsequently appealed to the Court of Appeal in Eldoret Criminal Appeal 268 of 2005 which by a judgment dated 24th February, 2006 similarly upheld the conviction and sentence.

3. The applicant is before this court for re-hearing. Having gone through the application dated 6th September, 2021 the applicant in essence seeks a re-hearing but I take note that the court of appeal has determined the matter to finality.

Analysis and determination

4. Article 50 (6) (a) & (b) of *the Constitution* provides that: -

   (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if-

      (a) The person's appeal, if any, has been dismissed by the Highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed; and

      (b) New and compelling evidence has become available.

5. Thus, for a new trial to be ordered under Article 50 (6) of *the Constitution*, the applicant herein must prove two things: first that his appeal to the highest court has been dismissed or that he did not appeal within the stipulated time allowed for appeal and secondly, he must prove that new and compelling evidence has become available. The court can only consider applications of such nature if they have satisfied the provisions of article 50(6) of *the Constitution* of Kenya 2010.

6. Similarly, in Art.50 (2) (p) & (q) of *the Constitution* expressly provides as follows. That the accused person has a right

> " to the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing and,
>
> "if convicted, to appeal to, or apply for review by, a higher court as prescribed by law."

7. At the time of the applicant's conviction, mandatory sentences had not been declared to be unconstitutional.

8. The Supreme Court's decision in *Francis Karioki Muruatetu & Another v Republic & 5 others* [2016] eKLR declaring the mandatory death sentence unconstitutional has necessitated resentencing of all persons previously sentenced to the mandatory sentences.

9. I have considered The *Sentencing Policy Guidelines*, 2023 and its application which is intended to promote transparency, consistency and fairness in sentencing. The relevant considerations in the proceeding inter alia, are the penalty law, mitigating or aggravating factors, and the objects of punishments.

10. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal set out the factors to be considered when the trial court is faced with a prescriptive provision of minimum and mandatory sentences. The facts of this case arose out of a trial under the *Sexual Offences Act*. The reasoning of it however, is applicable to the profile of the instant case on re-sentencing. The court observed as follows:

> [W]e hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

11. In sentencing, the gravity of the offence and the consequences of the offence on the victim are relevant factors. I have considered the application and all the information available. In such circumstances the court will ordinarily check the legality or propriety or appropriateness of the sentence.

12. The punishment prescribed by the law for the offence of murder is a death sentence under section 204 of the Penal Code. However, with the advent of the "Muruatetu case" mandatory sentences have been outlawed.

13. I take note that the applicant has so far served a total of twenty-six years remand period inclusive. It is evident that through the trainings undertaken by the applicant, he did not allow hopelessness and despair to overwhelm him. With the help and guidance of the Prison authorities, the Applicant has earned some skills which could prove useful to him, whenever he may regain his freedom from prison.

14. In the "*Muruatetu Case*", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

> "(a) age of the offender;
>
> (b) being a first offender;
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> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;
>
> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaption of the offender;
>
> (h) any other factor that the Court considers relevant."

15. I take the minimum sentence to be indicative of the seriousness of the offence. However, in my view and the trend in our current legal system, the nature of prescriptive minimum sentences does not create mandatory sentences, but preserves the discretion of judicial officers to sentence above and below the 'standard' by taking into account a non-exhaustive "check list of aggravating and mitigating factors" which are already largely taken into account by sentencing courts.

16. An aspect that is close to the person of the offender is his blame-worthiness or culpability in committing the crime. the determination of the blameworthiness of an offender is the harm his or her wrongdoing inflicts. It is therefore useful in determining an appropriate sentence to establish how blameworthy the offender is. The modern view of the seriousness of the offence also has to do with the blameworthiness of the offender. The gravity of the crime is affected by the extent to which the offender is blamed or held accountable for the harm caused or risked by the offence. A typical example is the youth of the offender. Other factors which reduce or diminish criminal capacity are a provocation, as much as a source of stress, and can be the cause of certain forms of mental illness, for instance. To be able to take the individual situation of petitioner into account this court needed to be provided with any such compelling evidence. One of the single parameter which stands out in this case is that of proportionality in sentencing. This is a well-established principle in Kenya's sentencing law. This is where the application of the principle translates into a close connection between the punishment and the seriousness of the offence.

17. When I take all these factors into consideration, and the underlying principles in the Supreme Court dicta of Francis Muruatetu Vs Republic (supra) it is my persuasion that the death sentence as passed is disproportionate to the offence. Following the Muruatetu decision the Supreme Court rendered the mandatory death penalty for the offence of murder unconstitutional for the very reason that the provision results in a grossly disproportionate sentence on the individual before the court. similarly, it was also held by the same court that the sentence constituted cruel and inhuman treatment under Art. 25 of the Constitution. As stated in Art. 50 (2) (p) & (q) of the *Constitution*"every accused person has the right the benefit of the least severe of the prescribed punishment if the prescribed punishment of offence has been changed between the time that the offence was committed and the time

of sentencing." In the language of this petition the issue of fairness of the sentence arose as one of the cardinal grievance. The convicted person should always enjoy the full protection of the law especially in the circumstances involving the loss of liberty, security and dignity. Hence, before a trial court can impose a criminal sanction on an offender that person must be accorded a fair trial. It is in those circumstances issues of mitigation and aggravating factors requires a careful factual examination of the relevant circumstance of each case. It is from this perspective the right to the least severe punishment has to be accorded as a benefit to the petitioner. In the current jurisprudential scheme rarely do courts in Kenya impose the death penalty. This debate about equality in sentencing started with the landmark case of Muruatetu which has played a pivotal role in the birth of the sentencing guidelines revolution as echoed from various court rooms.

18. To this end the death sentence be varied and substituted with a terminable custodial sentence of 28 years effective from 6th February, 2001. For avoidance of doubt the conviction as structured in both court is affirmed.

Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 24th DAY OF JANUARY, 2024

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R. NYAKUNDI

JUDGE